Supreme Court, U.S.
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No. 04-

IN THE

Supreme Court of the United States

JIM GUY TUCKER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the provision of 28 U.S.C. § 2244, requiring permission from the Court of Appeals to file a successive petition under 28 U.S.C. § 2255, applies to Rule 60(b) motions to vacate judgments and, if so, whether this provision is applicable when the appeal of the original § 2255 denial is still pending.

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The order of the Court of Appeals for the Eighth Circuit at issue in this case was entered on April 12, 2004 (App. A). It is not published. The unpublished district court order was filed on August 29, 2003 (App. B).

JURISDICTIONAL STATEMENT

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254. The opinion of the court of appeals was issued on April 12, 2004.

STATUTORY PROVISIONS AND RULE INVOLVED

28 U.S.C. § 2244:

> (b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.
>
> (2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—
>
> (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

28 U.S.C. § 2255:

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without

jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain—

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

Rule 60, Federal Rules of Civil Procedure:

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or

it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

STATEMENT OF THE CASE

This case presents the questions of whether a motion under Rule 60(b) FRCP to vacate the denial of relief under 28 U.S.C. § 2255 is governed by the "gatekeeper" provisions of 28 U.S.C. § 2244, and, if so, whether the provision is applicable when the appeal of the § 2255 denial has not been decided.

On June 7, 1995, a grand jury in the Eastern District of Arkansas under the direction of Independent Counsel (OIC) Kenneth Starr indicted Tucker, then the Governor of

Arkansas, his former tax attorney John Haley and Tucker's former business associate William Marks on a charge of conspiracy to impede the calculation and collection of income taxes, a so-called *Klein* conspiracy, based on *United States v. Klein*, 247 F.2d 908 (2d Cir. 1957), *cert. denied*, 355 U.S. 924, 78 S. Ct. 365 (1958). Tucker and Marks were also indicted on two non-tax counts.

In August, 1995, the indictment was dismissed by U.S. District Judge Henry Woods. This Court reinstated the indictment and disqualified Judge Woods. *United States v. Tucker*, 78 F.3d 1313 (8th Cir. 1996) [*Tucker I*]. Upon remand, the case was assigned to District Judge Stephen M. Reasoner.

The *Klein* conspiracy count, Count 3, essentially alleged that between October, 1987, and October, 1990, Tucker conspired to obstruct and impede the IRS by engaging in a series of transactions in order to impede the IRS in determining the amount of corporate taxes which otherwise would have been due on the sale of various cable TV systems. The OIC asserted that there had been a tax loss in excess of $3.8 million. It was the avoidance of this very large amount which was alleged to be both the motivation for, and the result of, the alleged conspiracy. The indictment did not allege the identity of the taxpayer alleged to owe the tax, the statutory basis for the calculation of the tax, or the tax law which was the object of the alleged conspiracy.

Tucker had believed that the transactions were legitimate. Before these transactions, Congress had amended Section 1374 of the Internal Revenue Code, 26 U.S.C. § 1374, with the amendments to be effective January 1, 1987. The transactions had been organized under the belief that

the new Section 1374 would govern them. But the indictment was written in a way that made it impossible to determine what tax law had given rise to the claim of a conspiracy to impede a tax determination or collection or which entity's taxes were at issue. The indictment certainly did not put Tucker on notice that the indictment was based on the assumption that the conspiracy was intended to impede the collection of a tax that had been repealed.

Thus in a motion and brief for bill of particulars filed January 8, 1998, Tucker asked "which entity's or person's income tax is at issue and the year for which such tax is owed." On February 5, 1998, a hearing was held on the motion. The OIC convinced the district court that the identity of the entity whose taxes were purportedly impeded was "irrelevant." Disclosure of the information clearly would have led to Tucker's ascertainment that he was charged with conspiring to impede the IRS in the collection of a repealed tax. That, in turn, necessarily would have resulted in the OIC having to admit that the indictment was based on a misrepresentation of both the applicable tax law applicable and the alleged loss to the government.

The Court's ruling could not be the subject of an interlocutory appeal. As a result, Tucker was confronted with an imminent trial in which he had been denied information vital for his defense. Because of the alleged loss of over $3.5 million, a conviction would have triggered mandatory imprisonment of probably 41 to 51 months under the United States Sentencing Guidelines. Tucker was still in recovery from years of liver disease and from a liver transplant barely one year earlier. He was under heavy medication. Tucker was offered a plea agreement which would avoid the risk of imprisonment and the consequent difficulties in obtaining

proper medical treatment. Thus, on February 20, 1998, although not knowing the specifics of the allegations, Tucker entered a plea of guilty to Count 3, the *Klein* conspiracy. The other two counts were dismissed.

The admissions forming the basis on which Tucker entered his plea on February 20, 1998, were minimal, and, particularly considering the later revelations, insufficient to sustain a conviction. He said he had acted on advice of counsel. (R. 11, 2/20/98 hearing) He also said that he had agreed "to not disclose the contract of sale in the disclosure statement to the bankruptcy court . . . and one of the purposes of the bankruptcy was to deal with tax issues." He stated that he did not agree with much of the OIC's recitation. (R. 25)

Tucker did not state that the September 1987 contract involving the sale was concealed from the IRS. Indeed, he has specifically asserted that it was disclosed to the IRS during an audit of the transaction in the early 1990s, and the government had not denied that assertion. At the time of the plea, Tucker did not know, and indeed could not have known, that the indictment alleged a conspiracy to impede the determination and collection of a tax repealed more than one year prior to the taxable transaction. Tucker could not have known that the OIC had made legal and factual misrepresentations to the grand jury in order to obtain the indictment.

It was months after his plea that Tucker first learned that the OIC possibly had based its case on a theory that Tucker had violated Old Section 1374. Tucker then filed a Motion for Declaration of Applicable Law in connection with the restitution proceeding in another effort to discover

specifically the tax law which was purportedly the object of the alleged conspiracy and to declare: (i) that Section 1374 as amended in 1986 ("New Section 1374") was the applicable law; (ii) that Old Section 1374 had been repealed prior to the transactions at issue; and (iii) that the OIC had no basis for asserting the applicability of the Old Section 1374. As of that date, at the latest, the OIC was on notice of its potential error. Had the OIC investigated and admitted its error at that time, Tucker could have moved to withdraw his plea then.

The OIC responded to the Motion for Declaration of Applicable Law on September 18, 1998 and for the first time formally disclosed to Tucker and the Court that the loss alleged, and the calculation in the indictment, was based upon a conspiracy to impede the IRS from determining and collecting a tax otherwise due under Old Section 1374. But the OIC asserted that it was Tucker who was wrong about the law. The OIC made two arguments — both of which have now been recanted by the government: (i) that the 1986 amendments did not cover "S" corporations created prior to January 1, 1987 (such as Tucker's) and (ii) that it was only the 1988 amendments to Section 1374 that did bring such corporations within the coverage of the 1986 enactment.

The district court relied on the representations of the OIC and declared Old Section 1374 to be the law applicable at the time of the transaction Tucker was sentenced to four years probation, a fine of $6,000.00, a $50.00 special assessment and, based on Old Section 1374, $1,000,000.00 in restitution.

Tucker appealed the restitution order on the basis that Old Section 1374 had been repealed prior to the acts of the alleged conspiracy and was inapplicable. The OIC continued to assert the applicability of Old Section 1374.

In the meantime, at Tucker's request, the IRS began normal administrative proceedings to review the transaction, the applicable tax law and the corporate tax owed, if any. Since the case had not been initiated by either the IRS or the Department of Justice, that analysis previously had been made only by the OIC and its staff, which included certain IRS agents assigned to the OIC's supervision.

On July 3, 2000, the Eighth Circuit reversed the district court. *United States v. Tucker*, 217 F.3d 960 (8th Cir. 2000) [*Tucker II*]. The Court left the issue of the applicable law in doubt. Although it agreed that Old Section 1374 may have been repealed, it did not comment on whether such appeal was a result of the 1986 Act or its subsequent 1988 amendments (or, even later regulations proposed in 1994 and finalized in 1996 implementing the 1986 amendments). It found that the district court had failed to give the OIC a chance to present any testimony in support of its position that Old Section 1374 was the governing law. The Court then directed that the OIC be offered an opportunity to present testimony from a "responsible official" of the IRS that Old Section 1374 would have been applied to the transaction by the IRS or alternatively, to present some other legal theory. The Court even suggested an alternative legal theory, perhaps assuming that the grand jury might have been presented such a scenario. Thus, Tucker was still left in doubt as to the government's theory of the object of the conspiracy alleged or the basis for the tax loss asserted.

Following that ruling the district court set a hearing for December 1, 2000, to allow the OIC to present testimony from an "appropriate official of the IRS" as to the applicable law. A few months prior to that hearing, the OIC learned that the IRS had made an internal preliminary determination that

the 1986 law governed the transaction. The OIC sought to halt any further administrative proceedings by the IRS on the grounds that the case against Tucker was still "under prosecution."

On December 1, 2000, Hickman Ewing of the OIC appeared and asserted that the OIC first began to question the accuracy of its legal interpretation after Tucker was sentenced. ". . . once Mr. Tucker pled guilty and was sentenced, we had a question about what law applies" (R. 13) This had not been previously disclosed to Tucker or to the Court. Ewing then admitted that in the week after October 2, 2000, he had received from "someone in the IRS" a copy of a letter from the examining agent concluding that the "new law" applies. Ewing admitted that he had not supplied that letter to Tucker pursuant to Tucker's request for materials encompassed by *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194 (1963). (R. 16)

The district court said that it lacked jurisdiction to order the IRS to make a determination, but that it would not enter a new restitution order until such as time as the IRS did make such a determination. An agreement was then reached in which the OIC agreed to halt its efforts to suppress a ruling by the IRS, and Tucker agreed to and did permit the OIC to submit evidence and argue its case for the application of Old Section 1374 at a hearing before an IRS case officer. The OIC appeared before the IRS case officer on March 6, 2001, with counsel for Tucker present and argued specifically and only that Old Section 1374 was the governing law at the time of the transactions and in the tax year at issue and that the loss at issue was a loss under Old Section 1374.

On May 23, 2002, the IRS case officer issued a notice of proposed deficiency which rejected the OIC's arguments as to the application of Old Section 1374 and finding the transaction governed by New Section 1374, as amended by the Tax Reform Act of 1986 and in effect January 1, 1987. Thus May 23, 2002, was the first date on which the IRS has announced an opinion on the tax law applicable to the transactions at issue, and was the first date on which Tucker had been advised that his understanding of the tax law had been correct all along.

On February 24, 2003 , while the matter was still in IRS administrative proceedings and the restitution issue still pending on the docket of the district court, Tucker filed a petition for relief under 28 U.S.C. § 2255 alleging:

- That the IRS's conclusion that Old Section 1374 was inapplicable to the transaction meant that the conspiracy alleged in the indictment was legally impossible, and therefore that Tucker was both factually and legally innocent of the conspiracy, and thus that his conviction violated Fifth Amendment due process guarantees.

- That the OIC committed a *Brady* violation by its refusal to disclose the theory — later demonstrated to be false and based on a law later shown to have been repealed — under which the indictment was obtained and the prosecution pursued.

- That because of the failure to provide proper notice of the true nature of the charge, Tucker's plea of guilty was not knowing and intelligent, a ground for relief cognizable under the doctrine expressed in

Bousley v. United States, 523 U.S. 614, 118 S. Ct. 1604 (1998). In reply to the government's response, he also noted a Sixth Amendment ineffective counsel issue.

- That although there was no default of this claim, any default of the foregoing claims is excused by the cause and prejudice test or the actual innocence test. These provide a gateway for Tucker's substantive claims to be heard on their merits.

At this point, for the first time, the Department of Justice entered the case and filed a response stating that the petition was unripe; that the claim was procedurally defaulted; that a *Klein* conspiracy did not require knowledge about the tax consequences; that there was no *Brady* violation and that the guilty plea was voluntarily and intelligently entered.

In its ruling against Tucker on his § 2255 petition, the district court found that the extraordinary circumstances of the case rendered the petition timely; that the claims were procedurally defaulted; and that under *Klein* conspiracy doctrine Tucker could not be actually innocent because, the Court opined, knowledge of the correct law was not necessary to complete a *Klein* conspiracy. However, the district court misapprehended Tucker's argument when it referred to Tucker relying on a "1986 amendment and a 1988 amendment to 26 U.S.C. § 1374" (Op. p. 9). This misapprehension enabled the district court to say that Tucker's complaint could bear solely on restitution. The Court's order implicitly accepted the government's assertion—now recanted— in its response to Tucker's § 2255 petition that Tucker was relying on "certain changes to the tax code enacted after his crime, but which were retroactive under certain circumstances" (Resp. p. 2)

The district court had also held that Tucker's claim was procedurally defaulted because "the government's theory of the case was known to defendant at least by the time his plea hearing was concluded. This forecloses any claim that the alleged *Brady* violation caused him not to raise the issue by way of motion to set aside his plea and/or in his appeal" (Op. p. 5) Although the government argued that the law was available to Tucker and he could have figured out OIC's error earlier, the government itself admits that it did not figure out the OIC's error until years later. The fact is that both the Independent Counsel for many years, and initially the Department of Justice, misstated the applicable law to Tucker, the district court and the Eighth Circuit. In *Banks v. Dretke*, __ U.S. __, 124 S. Ct. 1256 (2004), for purposes of cause for procedural default, a defendant is entitled to rely on the representations of the prosecution.

The district court erred perhaps because as late as the summer of 2003 when it responded to Tucker's § 2255 pleading, the government itself was still supporting the OIC position that Old Section 1374 law did govern Tucker's transaction, and that it was only the 1988 amendments that caused a reduced tax consequence. Thus, neither at the sentencing hearing nor during the briefing of the § 2255 petition did the district court itself yet have "notice" that the OIC had used a repealed tax statute to indict and prosecute Tucker.

At the same time that it denied the § 2255 petition, the district court scheduled a hearing on the restitution issue for December 10, 2003. In the § 2255 action, Tucker sought and was granted a certificate of appealability and proceeded with the appellate process. Tucker and the government then informed the court of appeals of the scheduling of this hearing

and of the possibility that information pertinent to the appeal might be developed. The Eighth Circuit then held the appeal in abeyance.

On September 30, 2003, the government filed a document entitled Government's Notice of Intent to Rely on Alternative Theory for Sentencing. In that pleading, the government finally admitted that New Section 1374 was applicable. This admission was reiterated in a stipulation filed on December 9, 2003.

At the hearing on December 10, 2003, the government also stipulated that the maximum possible corporate tax loss to the government would be $125,429.88. It did not contest that Tucker might actually get a net refund. The admission stands in stark contrast to the alleged $3.5 million of losses and multiple previous assertions of the OIC and then the Department of Justice that Tucker was simply relying on changes to the tax code "enacted after his crime."

On March 19, 2004, Tucker filed a Motion under 28 U.S.C. § 2244 for Permission to File Rule 60 Motion in district court. Tucker included in an appendix the proposed Rule 60 filing. In his Motion for Permission, Tucker pointed out that:

> This court of appeals has held that Rule 60 motions generally are to be deemed the equivalent of successive petitions and subject to the gatekeeping requirements of 28 U.S.C. § 2244. *Boyd v. United States*, 304 F.3d 813 (8th Cir. 2002).

28 U.S.C. § 2255 provides in pertinent part with regard to successive petitions — to which category this Court has assigned Rule 60 motions —

> A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain —
>
> > (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; . . . .

Tucker takes the position that the interests protected by 28 U.S.C. § 2244 and Rule 60 are not necessarily the same. The former is concerned with the integrity of the original criminal prosecution, whereas the latter deals with the integrity of the § 2255 process. Therefore, he asserts that even if he were deemed not to meet the § 2244 criteria, he is still entitled to relief under Rule 60 because of the incursion on the integrity of the court and the judicial process that Rule 60 is to rectify. Moreover, since there has been no appellate adjudication yet of the denial of § 2255 relief, the precedential concerns motivating § 2244 have not yet ripened.

Therefore, the issues presented to this Court had been presented to the court of appeals.

Although the government did not oppose Tucker's motion, on April 12, 2004, the court of appeals denied Tucker's motion and ordered the appeal process to continue. The court of appeals denied a stay of briefing in order to seek certiorari. As of this writing, Tucker has filed his opening brief.

REASONS FOR GRANTING THE PETITION

The Court Should Grant Certiorari To Decide Whether And Under What Circumstances Motions Under Rule 60 FRCP Are Subject To The Gatekeeper Provisions Of 28 U.S.C. § 2244

This Court should grant certiorari to determine whether the restrictions on filing of successor petitions found in 28 U.S.C. § 2244 apply to motions filed under Rule 60(b), FRCP. This Court granted certiorari in a similar situation in *Abdur'Rahman v. Bell*, 535 U.S. 1016, 122 S. Ct. 1605 (2002), but then dismissed the petition as improvidently granted. *Abdur'Rahman v. Bell*, 537 U.S. 88, 123 S. Ct. 594 (2003).

This is an issue which must be clarified and decided by this Court. The texts of the relevant statutes— 28 U.S.C. §§ 2244, 2255 and 2254 (this dealing with state prisoners) — do not mention Rule 60. The circuits are split in several different directions. The Eighth Circuit takes the position, for example in *Boyd v. United States*, 304 F.3d 813 (8th Cir. 2002), that Rule 60(b) motions, whether from §§ 2255 or 2254 proceedings, are subject to the gatekeeper requirement of § 2244. Other circuits have generally agreed. *See, e.g.*, *Landano v. Rafferty*, 897 F.2d 661 (3d Cir. 1990); *United States v. Rich*, 141 F.3d 550 (5th Cir. 1998); *McQueen v.*

Scroggy, 99 F.3d 1302 (6th Cir. 1996); *Burris v. Parke*, 130 F.3d 782 (7th Cir. 1997); *Lopez v. Douglas*, 141 F.3d 974 (10th Cir. 1998); *Mobley v. Head*, 306 F.3d 1096, 1096 (11th Cir. 2002).

However, at least one other circuit has disagreed. *Rodriguez v. Mitchell*, 252 F.3d 191 (2d Cir. 2001). The Ninth Circuit has set forth a general rule agreeing that § 2244 is generally applicable, but has posited certain possible exceptions for fraud. *Thompson v. Calderon*, 151 F.3d 918 (9th Cir. 1998). *Ortiz v. Mitchell*, 195 F.3d 520 (9th Cir. 1999). *See also United States v. MacDonald*, 161 F.3d 4, 1998 WL 637184 (4th Cir. 1998), *unpublished disposition*. At least one other circuit posits a case-by-case rule. *Rodwell v. Pepe*, 324 F.3d 66 (1st Cir. 2003).

Justice Stevens' dissent from denial of certiorari in *Abdur'Rahman* explains, quoting from the dissent of Judge Tjoflat in *Mobley v. Head*, *supra*:

> As Judge Tjoflat explained in a recent opinion addressing that precise issue, the difference is defined by the relief that the applicant seeks. Is he seeking relief from a federal court's final order entered in a habeas proceeding on one or more of the grounds set forth in Rule 60(b), or is he seeking relief from a state court's judgment of conviction on the basis of a new constitutional claim? Referring to the difference between a Rule 60(b) motion and a "second or successive" habeas corpus petition, Judge Tjoflat wrote:
>
> > The distinction lies in the harm each is designed to cure. A 'second or successive'

habeas corpus petition, as discussed above, is meant to address two specific types of constitutional claims by prisoners: (1) claims that 'rel[y] on a new rule of constitutional law,' and (2) claims that rely on a rule of constitutional law and are based on evidence that 'could not have been discovered previously through the exercise of due diligence' and would establish the petitioner's factual innocence. 28 U.S.C. § 2244(b)(3)(A). Neither of these types of claims challenges the district court's previous denial of relief under 28 U.S.C. § 2254. Instead, each alleges that the contextual circumstances of the proceeding have changed so much that the petitioner's conviction or sentence now runs afoul of the Constitution.

In contrast, a motion for relief under Rule 60 of the Federal Rules of Civil Procedure contests the integrity of the proceeding that resulted in the district court's judgment.

. . . . .

When a habeas corpus petitioner moves for relief under, for example, Rule 60(b)(3), he is impugning the integrity of the district court's judgment rejecting his petition on the ground that the State obtained the judgment by fraud. Asserting this claim is quite different from contending, as the petitioner would in a successive habeas corpus petition, that his conviction or sentence was obtained 'in

violation of the Constitution or laws or treaties of the United States.' 28 U.S.C. § 2254(a).

In sum, a 'second or successive' habeas corpus petition, like all habeas corpus petitions, is meant to remedy constitutional violations (albeit ones which arise out of facts discovered or laws evolved after an initial habeas corpus proceeding), while a Rule 60(b) motion is designed to cure procedural violations in an earlier proceeding — here, a habeas corpus proceeding — that raise questions about that proceeding's integrity.

. . . . .

As a final note, I would add that this rule is not just consistent with case law, but it also comports with the fair and equitable administration of justice. If, for example, a death row inmate could show that the State indeed committed fraud upon the district court during his habeas corpus proceeding, it would be a miscarriage of justice if we turned a blind eye to such abuse of the judicial process. Nevertheless, this is the result that would occur if habeas corpus petitioners' Rule 60(b) motions were always considered 'second or successive' habeas corpus petitions. After all, a claim of prosecutorial fraud does not rely on 'a new rule of constitutional law' and may not 'establish by clear and convincing evidence that . . . no reasonable factfinder would have found the applicant guilty of

> the underlying offense.' 28 U.S.C. § 2244(b)(2). It is a claim that nonetheless must be recognized.
>
> *Mobley v. Head*, 306 F.3d 1096, 1100-1105 (C.A.11 2002) (dissenting opinion). Judge Tjoflat's reasoning is fully consistent with this Court's decisions in *Stewart v. Martinez-Villareal*, 523 U.S. 637, 118 S.Ct. 1618, 140 L.Ed.2d 849 (1998), and *Slack v. McDaniel*, 529 U.S. 473, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000).

537 U.S. at 94-96, 123 S. Ct. at 597-98.

By requiring Tucker to go before a circuit panel, where he was denied, the Eighth Circuit has deprived Tucker of the right to pursue a meritorious Rule 60 motion, one that fits the long-established criteria for Rule 60 relief. His original claim, for which the Rule 60 motion is applicable, alleged that his conviction and sentence violates constitutional principles of due process as guaranteed by the Fifth Amendment. [He also alleged a Sixth Amendment ineffective counsel violation.]

Although § 2244 prohibits certiorari petitions from the denial, that prohibition cannot affect this Court's determination of whether the § 2244 ban even applies here. *Castro v. United States*, __ U.S. __, 124 S. Ct. 786 (2003).

However this Court rules on the overall interrelationship between § 2244 and Rule 60, the Eighth Circuit's rule applying § 2244 to cases pending on direct appeal appears to contradict this Court's holding. In *Stone v. I.N.S.*, 514 U.S. 386, 115 S. Ct. 1537 (1995), this Court held in dicta that:

> A litigant faced with an unfavorable district court judgment must appeal that judgment within

> the time allotted by Federal Rule of Appellate Procedure 4, whether or not the litigant first files a Rule 60(b) motion (where the Rule 60 motion is filed more than 10 days following judgment). Either before or after filing his appeal, the litigant may also file a Rule 60(b) motion for relief with the district court. The denial of the motion is appealable as a separate final order, and if the original appeal is still pending it would seem that the court of appeals can consolidate the proceedings.

514 U.S. at 401, 115 S. Ct. at 1547

Tucker has been prejudiced by his inability to pursue a Rule 60 motion. Tucker should entitled to pursue relief under several different portions of Rule 60(b). The decision denying § 2255 relief was a mistake under 60(b)(1). The *admission* of the government that the prosecution misrepresented the applicable law to Tucker and the courts, and denied that misrepresentation until late 2003 is newly discovered evidence which Tucker had been diligently seeking for years, but which was only recently made, and is cognizable under Rule 60(b)(3). The longtime assertion that Old Section 1374 was applicable clearly may be denominated a fraud or misrepresentation of the adverse party. Rule 60(b)(5). This also falls within Rule 60(b)(6), the catchall other reasons: The government's renunciation of a longheld position on the crucial issue in the case taints the entire earlier proceedings. But perhaps a more fundamental point is that confidence in the ultimate result and in the judicial process has been undermined by the events of this case.

The government's explicit admission that Old Section 1374 is not applicable to the transaction, and that New Section 1374 as effective January 1, 1987, was applicable at the time of the transactions, and that the maximum corporate tax loss possible was not over $3.5 million but at most, no more than $125,500 (before reductions arising from a reduction in Tucker's personal tax) is new evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the Tucker guilty of the offense. That is true in particular for these reasons: In light of the evidence as a whole, a grand jury would not have indicted Tucker if there had not been misrepresentations of law and fact to the grand jury. Had this information been disclosed before trial, Tucker might have been entitled to dismissal of the indictment for governmental misconduct under the doctrine enunciated in *Bank of Nova Scotia v. United States*, 487 U.S. 250, 108 S. Ct. 2369 (1988), and which is grounded in Fifth Amendment due process and Rule 52, F.R. Crim. P. If the Independent Counsel had properly disclosed its misrepresentation to the grand jury as to the object and consequences of the conspiracy, Tucker would not have entered a plea of guilty. Had the prosecution's use of a repealed tax law and a loss calculation under the law been properly disclosed, no reasonable jury would have convicted Tucker.

The facts of this case present the circumstances contemplated by the equitable considerations contemplated by Rule 60. Tucker should be allowed to present his Rule 60 claim to the district court, but was forced by circuit precedent to seek permission, although the texts of §§ 2244 and 2255 are silent on such a requirement. This Court should grant

certiorari to decide the interrelationship of 28 U.S.C. § 2244 and Rule 60, and upon plenary argument should hold that Rule 60 motions are not subject to § 2244, particularly when they precede the determination of the original case on appeal.

CONCLUSION

Tucker respectfully prays that this Court grant certiorari, and that upon plenary briefing and argument, this Court hold that the provisions of 28 U.S.C. § 2244 requiring permission of the court of appeals to file a successive petition do not apply to motions under Rule 60, FRCP.

Respectfully submitted,

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Attorney for Petitioner

APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT DATED APRIL 12, 2004

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 03-3559

United States of America,

Appellee,

v.

Jim Guy Tucker,

Appellant.

Appeal from the United States District Court for the Eastern District of Arkansas

Appellant's motion under 28 U.S.C. section 2244 for permission to file a Rule 60 motion in the district court has been considered by the court and is denied.

The stay of proceedings previously granted is set aside. Appellant's opening brief and appendix are due May 14, 2004. Appellee's brief is now due June 14, 2004. The reply brief (optional) is now due June 28, 2004.

April 12, 2004

Order Entered at the Direction of the Court:
s/ Michael E. Gaus
Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS, WESTERN DIVISION DATED AUGUST 28, 2003 AND FILED AUGUST 29, 2003

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

No. 4:95CR00117-001 SMR
No. 4:03CV00118

UNITED STATES OF AMERICA

PLAINTIFF

vs.

JIM GUY TUCKER

DEFENDANT

ORDER

Presently before the Court is Defendant's Motion To Vacate Sentence Under 28 U.S.C. § 2255 (Doc No. 341). The Government has filed a Response (Doc. No. 347), and Defendant has filed a Reply (Doc. No. 348). For the reasons stated below, the motion is denied.

Facts

The facts of this case, as described by the Eighth Circuit, are as follows:

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Former Arkansas Governor Jim Guy Tucker pleaded guilty to conspiracy to defraud the United States by impeding the assessment and collection of income tax in violation of 18 U.S.C. § 371. The plea agreement provided that Tucker's sentence would include a term of probation, a fine, and the payment of restitution based on Tucker's share of "the loss sustained by the United States as a result of the offense."

* * *

We will briefly describe the complex transactions at issue, based upon fact statements in the PSR to which Tucker did not object, plus the sentencing hearing testimony of his long-time accountant. In 1987, Tucker and William Marks undertook a joint venture in the cable television business, agreeing to divide their profits equally. At the time, Marks owned 18% of Planned Cable Systems (PCS), a subchapter C corporation that owned several cable television systems. Tucker owned 100% of Cable Management Inc. (CMI), an Arkansas corporation that had elected subchapter S status in May 1985.* In June 1987, Marks and Tucker acquired the remaining shares

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* Briefly stated, under the Internal Revenue Code, most incorporated businesses are subchapter C corporations, meaning that their activities are taxed at the corporate level. A subchapter S corporation is a qualified corporation that elects to have its business activities taxed only at the shareholder level. See 26 U.S.C. §§ 1361-1379.

of PCS from a third party for $6,000,000 and merged PCS into CMI, with Marks acquiring a 50% interest in CMI from Tucker.

One of PCS's businesses was Plantation Cable System, a Florida cable operator. In August 1987, an unrelated third party agreed to purchase Plantation's assets from CMI for $15 million. When advised that this transaction would realize substantial taxable gain, Tucker, Marks, and a tax attorney devised a series of sham transactions to minimize their tax liability. They reversed the PCS-CMI merger and transferred the PCS assets into LMS, falsely representing that Tucker's only interest in that corporation was as a substantial secured creditor. They then put LMS into bankruptcy. Aided by further misrepresentations to the bankruptcy court, they had the Plantation assets transferred to Tucker in exchange for his secured debt. In January 1988, Tucker sold the Plantation assets to the unrelated buyer for $14.75 million. Tucker received $ 11.75 million of the purchase price; and Marks received $3 million in the form of non-compete payments. In his 1988 individual tax return filed in early 1989, Tucker claimed a stepped-up basis in the Plantation assets and paid tax on a reported capital gain of $4,466,977. CMI paid no corporate-level capital gains tax on the sale of the Plantation assets.

United States v Tucker, 217 F.3d 960, 961-62 (8th Cir. 2000) (footnote in original). Defendant appealed the amount of

restitution included in this Court's sentence. This Court's decision on that issue was reversed, and Defendant's case was remanded for the purpose of resentencing with respect to the amount of restitution.

Defendant now seeks, pursuant to 28 U.S.C. § 2255, to have this Court vacate his conviction and entire sentence. Defendant has three theories upon which he relies: 1.) that he is actually innocent of the crime to which he entered a plea of guilty; 2.) that before he entered his guilty plea, he was denied information in violation of *Brady v. Maryland*, 373 U.S. 83 (1963); and 3.) that his plea was not knowingly, intelligently, and voluntarily entered. The Government disagrees with all three theories.

Ripeness

As a preliminary matter, this Court must first discuss whether Defendant's motion is premature. "Ordinarily resort cannot be had to 28 U.S.C.A. § 2255 or habeas corpus while an appeal from conviction is pending." *Masters v Fide*, 353 F.2d 517, 518 (8th Cir. 1965). Other courts have phrased the test in the converse and held that "absent extraordinary circumstances, [a] district court should not consider § 2255 motions while a direct appeal is pending" because the disposition of the underlying case may render the motion moot. *United States v. Robinson*, 8 F.3d 398, 405 (7th Cir. 1993). Defendant argues that there are extraordinary circumstances in this situation. The Government disagrees.

This Court must find that there are extraordinary circumstances in this case which warrant this Court

considering this motion. First, as discussed in more detail below, Defendant has already had one direct appeal. He did not raise these issues in that appeal. While Defendant may ultimately appeal this Court's sentence of restitution again if any is ordered, he likely would not be allowed to raise these new arguments at that time. Therefore, any further direct appeal is unlikely to result in this motion becoming moot.

Second, Defendant's probation period ended shortly after he filed this motion. In order to obtain relief pursuant to 28 U.S.C. § 2255, the movant must be "in custody." 28 U.S.C. § 2255. A probationer is in custody for purposes of 28 U.S.C. § 2255. *Borre v. United States*, 940 F.2d 215, 217 n.2 (7th Cir. 1991). Furthermore, if the movant's term of probation ends while the motion is pending, he may still pursue relief because a continuing injury is presumed *See Spencer v. Kemna*, 523 U.S. 1, 11-12 (1998). Defendant's claims are considered to be in controversy at this time. However, were this Court to dismiss this motion as premature now, then, when it later became ripe, Defendant would no longer be able to seek relief because he would not longer be "in custody" for 28 U.S.C. § 2255 purposes. Therefore, this Court believes that Defendant's later inability to raise these claims to be an extraordinary circumstance warranting consideration of them at this time.[1]

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1. This Court considered holding this motion in abeyance until it became ripe. However, as discussed in a separate Order, while this Court plans to move ahead with Defendant's resentencing, final resolution of his underlying criminal case is likely still months, if not years, away. Regardless of this Court's decision on the restitution issue at the resentencing hearing, an appeal is likely by the disagreeing

(Cont'd)

Appendix B

Procedural Default

The Government contends that Defendant's claims are procedurally barred. "It is well settled that a voluntary and intelligent plea of guilty made by an accused person, who has been advised by competent counsel, may not be collaterally attacked." *Mabry v. Johnson*, 467 U.S. 504, 508 (1984) (footnote omitted). Furthermore, "even the voluntariness and intelligence of a guilty plea can be attacked on collateral review only if first challenged on direct review . . . [because] [h]abeas review is an extraordinary remedy and will not be allowed to do service for an appeal." *Bousley v. United States*, 523 U.S. 614, 621 (1998) (internal quotation omitted). "Indeed, the concern with finality served by the limitation on collateral attack has special force with respect to convictions based on guilty pleas." *Id.* (internal quotation omitted).

In the instant case, Defendant's only claim of error on appeal was that the restitution ordered by this Court was inadequately supported by the evidence and based on an incorrect interpretation of the tax laws. Each of Defendant's theories are based on Defendant's claims that his plea was based on a law which did not exist at the time of his actions. He claims that the fact that this law allegedly did not exist at

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(Cont'd)

party (or both parties). Furthermore, a petition for a writ of *certiorari* could be sought after the Eighth Circuit reached a decision on any subsequent appeal. This is to say nothing of the underlying civil tax case which appears to be many months, if not years, from resolution. This Court does not believe it would be a wise use of judicial resources to allow this motion to languish for that long.

the time of his actions makes it legally and factually impossible for him to have committed his crime. He also claims that his plea was invalid because the Government did not reveal the theory under which he was indicted in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). He further claims that his plea was not knowing and intelligent because the Government did not reveal the theory under which he was indicted. Defendant's claims are unquestionably procedurally barred. At the very latest, Defendant knew the Government's theory of the case at the conclusion of his plea hearing. Even assuming that Defendant is correct that the Government was obligated to inform him of its legal theory, an assumption of which this Court is highly dubious, it does not explain why Defendant did not raise his claims in a motion to set aside his plea with this Court or in his appeal to the Eighth Circuit. This Court must find that Defendant's claims are procedurally barred.

Excusing Procedural Default

"Where a defendant has procedurally defaulted a claim by failing to raise it on direct review, the claim may be raised in habeas only if the defendant can first demonstrate either 'cause' and actual 'prejudice,' or that he is 'actually innocent.'" *Bousley*, 523 U.S. at 622 (internal quotation omitted).

Cause and Prejudice

Defendant asserts two possible "causes" for his default. First, he asserts that the aforementioned alleged *Brady* violation caused his default. This contention is without merit. As explained above, the Government's theory of the case

was known to Defendant at least by the time his plea hearing concluded. This knowledge forecloses any claim that the alleged *Brady* violation caused him to not raise the issue by way of a motion to set aside his plea and/or in his appeal. The alleged *Brady* violation cannot excuse Defendant's default.

Second, Defendant asserts that his attorneys' failure to raise these issues on appeal amounts to ineffective assistance of counsel and was the cause of his default. The "process of winnowing out weaker arguments on appeal and focusing on those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy." *Smith v. Murray*, 477 U.S. 527, 536 (1986) (internal quotation omitted). This Court believes that Defendant's attorneys' failure to raise these issues was perfectly reasonable.

After this Court accepted Defendant's plea of guilty, the Government was allowed to dismiss the two other counts of the indictment pending against Defendant. At the sentencing hearing, the Court granted the Government's § 5K1.1 motion and gave Defendant a sentence of probation as requested by the Government. According to the Presentence Investigation Report, these actions reduced Defendant's exposure from a guideline range of forty-one to fifty-one months of imprisonment to a sentence of probation. Far from being ineffective assistance, Defendants' attorneys' actions were no doubt based on their concern that Defendant would expose himself to substantial prison time if he raised these issues on appeal. Furthermore, while not relied on in reaching its decision on this point, the Court would point out that

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Defendant is a former attorney and never raised any objection to his plea at the time of his sentencing hearing or at any time prior to this motion. Ineffective assistance of counsel cannot excuse Defendant's default.

Actual Innocence

A defaulted claim "may still be reviewed in [a] collateral proceeding if [the movant] can establish that a constitutional error in his plea colloquy has probably resulted in the conviction of one who is actually innocent." *Bousley*, 523 U.S. at 623 (internal quotation omitted). "To establish actual innocence, [the movant] must demonstrate that, in light of all the evidence, it is more likely than not that no reasonable juror would have convicted him." *Id.* (internal quotation omitted). "'[A]ctual innocence' means factual innocence, not mere legal insufficiency." *Id.* "In other words, the Government is not limited to the existing record to rebut any showing that [the movant] might make[;] [r]ather . . . the Government [is] permitted to present any admissible evidence of [the movant's] guilt even if that evidence was not presented during [the movant's] plea colloquy. . . ." *Id.* "In cases where the Government has forgone more serious charges in the course of the plea bargaining, [the movant's] showing of actual innocence must also extend to those charges." *Id.*

Defendant claims he is actually innocent of the crime of which he was charged because it was legally and factually impossible for him to have committed it. As noted above, Defendant pleaded guilty to conspiracy to defraud the United States by impeding the assessment and collection of income

tax in violation of 18 U.S.C. § 371. This crime is commonly known as a "*Klein* conspiracy." *United States v. Fletcher*, 322 F.3d 508, 513 (8th Cir. 2003) (citing *United States v. Klein*, 247 F.2d 908 (2d Cir. 1957)). "To convict a defendant of a *Klein* conspiracy, the government must show the existence of an agreement to defraud the IRS and an overt act by one of the conspirators in furtherance of the agreement's objectives." *Fletcher*, 322 F.3d at 513. Furthermore, a *Klein* conspiracy "need not result in a monetary loss to the federal government." *United States v. Anderson*, 579 F.2d 455, 458 (8th Cir.), *cert. denied*, 439 U.S. 980 (1978). One particular case is particularly instructive

> Conspiracy to Defraud the United States.
>
> The [defendants] argue that a conspiracy as described does not constitute a conspiracy to defraud the United States because there is no proof of gain to them and no proof of harm to the United States. Further, they claim no fraudulent behavior occurred in connection with this conspiracy.
>
> Initially, we note that the charge is conspiracy to defraud, not an actual defrauding. Second, the cases clearly establish that a conspiracy to defraud the United States need not anticipate cheating the government out of property or money: To conspire to defraud the United States . . . also means to interfere with or obstruct one of its lawful governmental functions by deceit, craft or trickery, or at least by means that are dishonest. It is not necessary that the Government shall be subjected

> to property or pecuniary loss by the fraud, but only that its legitimate official action and purpose shall be defeated by misrepresentation, chicane or the overreaching of those charged with carrying out the governmental intention.

Hammerschmidt v United States, 265 U.S. 182,188, 44 S.Ct. 511, 512, 68 L.Ed. 968 (1924).

For example, *Dennis v. United States*, 384 U.S. 855, 86 S.Ct. 1840, 16 L.Ed.2d 973 (1966), involved a conspiracy to submit false affidavits to the NLRB. The Court emphasized that section 371 "reaches 'any conspiracy for the purpose of impairing, obstructing, or defeating the lawful function of any department of Government'" *Id.* at 861, 86 S.Ct. at 1844 (quoting *Haas v. Henkel*, 216 U.S. 462, 479, 30 S.Ct. 249, 253, 54 L.Ed. 569 (1910)). *See also Lutwak v. United States*, 344 U.S. 604, 73 S.Ct. 481, 97 L.Ed. 593 (1953); *Haas v. Henkel*, 216 U.S. 462, 30 S.Ct. 249, 54 L.Ed. 569 (1910); *United States v. Anderson*, 579 F.2d 455 (8th Cir.), *cert. denied*, 439 U.S. 980, 99 S.Ct. 567, 58 L.Ed.2d 651(1978); *United States v. Hay*, 527 F.2d 990 (10th Cir. 1975), *cert. denied*, 425 U.S. 935, 96 S.Ct 1666, 48 L.Ed.2d 176 (1976); *United States v. Jacobs*, 475 F.2d 270, 283 (2d Cir.), *cert. denied*, 414 U.S. 821, 94 S.Ct 116, 38 L.Ed.2d 53 (1973). Anticipated pecuniary gain to the conspirators is also unnecessary.

The evidence must show a scheme to impair, obstruct, defeat or interfere with lawful governmental functions through fraudulent or dishonest means. The [defendants] argue there is no proof of such a scheme since all governmental work was performed.

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In *United States* v. *Anderson*, 579 F.2d 455 (8th Cir.), *cert. denied*, 439 U.S. 980, 99 S.Ct. 567, 58 L.Ed.2d 651 (1978), a judge, as financial officer of the county, approved his son's use of employees paid through federal Comprehensive Employment and Training Act (CETA) funds to perform some of the work on fencing projects the son performed on highway projects funded partially by the federal government.

The defendants there argued that there was no conspiracy to defraud since there was no interference with programs. A highway had been built for the cost anticipated, and workers had received federally funded employment as intended. The court rejected these arguments. "The defendants' actions . . . interfered with the government's interest in 'seeing that the entire project (was) administered honestly and efficiently and without corruption and waste.'" 579 F.2d at 458-59 (quoting *United States v Hay*, 527 F.2d 990, 998 (10th Cir. 1975), *cert. denied*, 425 U.S. 935, 96 S.Ct. 1666, 48 L.Ed.2d 176 (1976)). Similarly, in *Langer v. United States*, 76 F.2d 817 (8th Cir. 1935), the court approved an indictment charging the Governor of North Dakota and others of conspiring to defraud the United States by requiring employees hired with federal funds to contribute five percent of their salaries to the Governor's political party for use in publishing a political newspaper. The court found that a conspiracy to defeat application of the funds to their statutory purposes was within the statute. Even if the salaries were not excessive, the court concluded the scheme

would obstruct administration because efficiency and morale might be lowered. *Id.* at 824.

United States v. Pintar, 630 F.2d 1270, 1277-78 (8th Cir. 1980).

In the instant case, Defendant argues that because he allegedly owed no income tax (an allegation the Government vigorously disputes) under the law in effect at that time, he cannot have been guilty of conspiring to defraud the IRS. Defendant's motion gives a thorough recitation of the evolution of the tax law in question. Essentially, his theory is that because a 1986 amendment and a 1988 amendment to 26 U.S.C. § 1374 applied to the transactions in question, he did not owe any tax and, therefore, did not defraud the IRS and could not have agreed to defraud the IRS. While these amendments have great relevance in the determination of Defendant's restitution amount, this Court believes that Defendant's attempt to use them to cast doubt on his guilt is without merit.[2]

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2. Defendant relies on *United States v. D'Agostino*, 145 F.3d 69 (2d Cir. 1998). In that case, the defendants' convictions for tax evasion were reversed because they actually did not owe the taxes as alleged by the government. *Id.* at 72-73. The Second Circuit also reversed the defendants' convictions for the alleged *Klein* conspiracy because, the court reasoned, if they "did not owe taxes on the diverted corporate income, then they cannot be guilty of defrauding the government *by not reporting the finds* on their personal tax returns." *Id.* at 73 n.6 (emphasis added). Had Defendant's only action in this case been the failure to include a particular class of income on his tax returns, the *D'Agostino* case would be more persuasive. However, in the present case Defendant devised a series of sham transactions and made fraudulent misrepresentations to the bankruptcy court actions which, unlike those in the *D'Agostino* case, were separate and apart from the filing of a tax return and, therefore, unrelated to the amount of tax owed (or not owed).

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The case law cited above makes is abundantly clear that the Government need only show the existence of an agreement to defraud the IRS and an overt act by one of the conspirators in furtherance of the agreement's objectives or, in other words, that Defendant engaged in a scheme to impair, obstruct, defeat, or interfere with lawful governmental functions through fraudulent or dishonest means. As the Eighth Circuit explained in its opinion, there was an agreement between, at least, Defendant Tucker and his co-Defendant William Marks to impair, obstruct, defeat, and interfere with the collection of taxes by the IRS. Furthermore, numerous overt acts were committed in furtherance of the agreement. To wit, Defendant "devised a series of sham transactions to minimize [his] tax liability" and made "misrepresentations to the bankruptcy court." *Tucker*, 217 F.3d at 961-62. The fact that Defendant and/or his tax attorney may have been mistaken as to the *need* to interfere with the collection of taxes by the IRS because his tax liability was actually lower than he believed does not change the fact that he agreed to interfere and committed fraudulent acts in furtherance of that interference.

Furthermore, even if the Government was also mistaken as to the amount of money it lost as a result of Defendant's actions, the case law is clear that an actual pecuniary loss is not a required element of a *Klein* conspiracy. Part of the confusion on this point stems from the fact that Defendant was not charged with income tax evasion. Had Defendant been so charged, this Court might agree that he could not evade a tax law for which he was not liable.[3] However, this is not the case here. Quite simply, Defendant and his

3. *See supra* note 2.

co-conspirator(s) agreed to *impair*, *obstruct*, *defeat*, *and interfere* with the collection of taxes by the IRS. Defendant did not plead guilty to evasion of income taxes. Defendant's participation in the sham bankruptcy at the very least impaired and interfered with the lawful function of the IRS. The fact that he may not have needed to so participate does not, however, alleviate his guilt. Having found that the record cannot support a claim of actual innocence, this Court must find that this exception cannot excuse Defendant's procedural default.

The Merits Of The Motion

While this Court has found that Defendant's motion is procedurally barred, it will briefly discuss the merits of Defendant's three theories for relief. First, Defendant's claim of legal impossibility is without merit as explained under the section above which discusses actual innocence.

Second, Defendant's claim that his guilty plea was not knowingly entered is without merit. As noted above, "even the voluntariness and intelligence of a guilty plea can be attacked on collateral review only if first challenged on direct review." *Bousley*, 523 U.S. at 621. Defendant made no such challenge in his appeal, nor did he move this Court to withdraw his guilty plea. Furthermore, Defendant's plea agreement as well as his comments during his plea hearing give plenty of evidence of the voluntary and knowing nature of the plea, and, as previously noted, he never moved to set the plea aside.

Third, Defendant's claim that the Government committed a Brady violation is without merit. "A knowing and intelligent guilty plea forecloses independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea." *United States v. Vaughan*, 13 F.3d 1186, 1187 (8th Cir.) (internal quotation omitted), *cert. denied*, 511 U.S. 1094 (1994). As noted above, Defendant's plea was knowing and intelligent. Therefore, any claims based on the deprivation caused by the alleged Brady violation cannot be reviewed.

Therefore, for the reasons stated above, Defendant's Motion To Vacate Sentence Under 28 U.S.C. § 2255 (Doc. No. 341) is DENIED and the motion is DISMISSED WITH PREJUDICE.[4]

IT IS SO ORDERED this 28th day of August 2003,

s/ [illegible]
UNITED STATES DISTRICT JUDGE

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4. Defendant, in his motion, requested a hearing on the motion. "[A]n evidentiary hearing is necessary only where the court is presented with some reason to question the evidence's credibility." *Kingsberry v. United States*, 202 F.3d 1030, 1033 (8th Cir.) (internal quotation omitted), *cert. denied*, 531 U.S. 829 (2000). The statute also makes it clear that a hearing is only necessary when the motion, files, and records of the case do not conclusively show that the movant is not entitled to relief. 28 U.S.C. § 2255. *See also* Fed. R. Governing § 2255 Proceedings 8(a) (stating that a court should "determine whether an evidentiary hearing is required"). This Court does not believe that Defendant's motion makes allegations which necessitate a hearing. The Court has rejected each of Defendant's claims on a legal rather than factual basis. Therefore, this Court does not believe a hearing would serve any useful purpose.

APPENDIX C — JOINT STIPULATION AND MOTION FOR DECLARATION OF RESTITUTION AMOUNT DATED AND FILED DECEMBER 9, 2003

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

No.4:95CR00117-001 SMR

UNITED STATES OF AMERICA

PLAINTIFF

vs.

JIM GUY TUCKER

DEFENDANT

JOINT STIPULATION AND MOTION FOR DECLARATION OF RESTITUTION AMOUNT

Comes the Plaintiff UNITED STATES OF AMERICA, and Defendant, JIM GUY TUCKER, by and through their respective attorneys, in response to the Court's Order dated August 28, 2003, for this Joint Stipulation for Declaration of the Amount of Restitution in the case. Plaintiff and Defendant, following the initial determination by the Internal Revenue Service, having reached an agreement on the maximum potential corporate tax owed by Cablevision Management, Inc. ("CMI"), in connection with the deemed sale of the Plantation Cable System assets, jointly represent and stipulate to the Court as follows:

Appendix C

1. That the Court previously entered an Order that Defendant would pay restitution in an amount equal to one-half (1/2) of the corporate tax liability of CMI as ultimately determined by the civil representatives of the Internal Revenue Service.

2. That the Internal Revenue Service ("IRS") issued a Notice of Proposed Deficiency dated February 25, 2002 ("Notice") against CMI in the amount of $125,429.88, representing the Internal Revenue Service's preliminary determination of CMI's maximum potential corporate tax liability for the "Built-in Gains" tax under 26 U.S.C. 1374, as amended by the Tax Reform Act of 1986 as effective January 1,1987 ("post-1986 Internal Revenue Code Section 1374"). One half of such liability would be $62,714.94.

3. That Defendant has previously deposited $100,000 (the "Deposit") with the Internal Revenue Service on or about April 17, 2000, and that the Deposit should be credited against the amount of restitution ordered in this case and ultimately applied against the final amount of the liability, if any, ultimately resolved by agreement or litigation between the Defendant and the Internal Revenue Service.

4. The parties disagree as to whether the restitution figure should include interest. If it is ultimately determined that CM has a tax liability for the "Built-in Gains" tax, then interest will be owed by Defendant on the final amount of such tax liability. As of December 9, 2003, if CMI's maximum potential corporate tax liability described in the Notice is sustained, then after taking into account a $100,000 deposit made on or about April 17, 2000 for purposes of

tolling further interest accruals on the tax liability of CMI, the sum of $107,038.51 would represent the amount of accrued and unpaid interest that would be due and owing on one-half of CME's maximum potential corporate tax liability.

5. The Government and Defendant acknowledge that the stipulations set forth herein are for restitution purposes only and are made without any admission on the part of or concession of any right of the Internal Revenue Service to adjust, or of CMI, and the Defendant to challenge, the proposed adjustments set forth in the Notice and the Government acknowledges that Defendant does not admit that any loss to the Government has occurred.

6. That any future modification in the amount of the tax liability of CMI, if any, is to be resolved by or between the Internal Revenue Service and the Defendant in the ordinary course of the Internal Revenue Service review and appeal process, or by litigation.

Appendix C

IN WITNESS WHEREOF, the Plaintiff and Defendant respectfully submit this Joint Stipulation and Motion for Declaration of Restitution this 9th day of December, 2003.

Respectfully submitted,

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(2)

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No. 04-83

In the Supreme Court of the United States

JIM GUY TUCKER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner was entitled to seek relief under Federal Rule of Civil Procedure 60(b) from the district court's denial of his collateral attack under 28 U.S.C. 2255, without first obtaining authorization from the court of appeals, under 28 U.S.C. 2244, to file a second or successive motion under Section 2255.

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In the Supreme Court of the United States

No. 04-83

JIM GUY TUCKER, PETITIONER

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The order of the court of appeals (Pet. App. 1a) denying petitioner's motion under 28 U.S.C. 2244 is unreported.

JURISDICTION

The order of the court of appeals was entered on April 12, 2004. The petition for a writ of certiorari was filed on July 12, 2004 (Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. A grand jury sitting in the Eastern District of Arkansas returned a three-count indictment against petitioner. In Count 3 of the indictment, petitioner was

charged with conspiring to defraud the United States for the purpose of impeding, impairing, obstructing, and defeating the lawful government functions of the Internal Revenue Service (IRS), in violation of 18 U.S.C. 371. Pet. App. 3a. Pursuant to a plea agreement, petitioner pleaded guilty to that count, and the government dismissed the first two counts. *Ibid.* On May 17, 1999, petitioner was sentenced to four years of probation, fined $6000, and ordered to pay $1 million in restitution. No. 4:95-CR-117, Docket Entry Nos. 316 and 320 (E.D. Ark. May 17 and 21, 1999).

2. On direct appeal, petitioner challenged the computation of the government's tax loss for purposes of his restitution order, arguing that "new Internal Revenue Code § 1374," rather than "old Internal Revenue Code § 1374," should apply to his case. Petitioner did not challenge his conviction on that basis, but he did argue that, because of this error, the district court had miscalculated the amount of restitution owed. A panel of the United States Court of Appeals for the Eighth Circuit vacated petitioner's sentence and remanded. *United States* v. *Tucker*, 217 F.3d 960, 966 (2000).

The court of appeals reasoned that an order of restitution must be made based on a finding of "actual loss," and that the United States' actual loss could not be determined without knowing whether, contrary to the IRS's stated enforcement policy, the IRS would have taken the position that the old version of Section 1374 applied to the transaction at issue. See 217 F.3d at 965. The court of appeals thus reversed the restitution order and remanded for further sentencing proceedings. See *id.* at 961, 966.

3. On remand, the United States agreed that "new Internal Revenue Code § 1374" should be used to determine the amount of restitution, and that the tax

loss was much less than originally calculated using old Section 1374. Pet. App. 19a. The parties entered a stipulation concerning the amount of restitution. *Id.* at 18a-21a. On December 10, 2003, an amended judgment was entered. No. 4:95-CR-117, Docket Entry No. 361 (E.D. Ark. Dec. 10, 2003). Neither party appealed from the amended judgment.

4. Before entry of the amended judgment, petitioner filed with the district court a "Motion To Vacate Sentence Under 28 U.S.C. § 2255," seeking to vacate his conviction and sentence on the ground that his indictment and plea had been premised on the applicability of the old version of Section 1374. Pet. App. 2a, 5a. The district court, noting that petitioner's probation had ended shortly after the filing of the motion, determined that there was sufficient cause to rule on the motion before a new restitution order was imposed. *Id.* at 5a-6a.

The district court held that petitioner's claims were "unquestionably procedurally barred." Pet. App. 8a. The court noted that petitioner had been long aware of which version of Section 1374 the government relied upon, and had, in fact, made that issue the focus of his appeal challenging the restitution order, but that petitioner had neither moved to set aside his plea nor contested his conviction on appeal. *Ibid.* The court also rejected petitioner's claims on the merits. *Id.* at 16a-17a. The district court issued a certificate of appealability, and petitioner filed a timely notice of appeal. No. 4:95-CR-117, Docket Entry Nos. 355 and 356 (E.D. Ark. Oct. 10 and 16, 2003).

5. During the pendency of petitioner's appeal from the denial of Section 2255 relief, petitioner filed in the court of appeals a motion styled "Motion Under 28 U.S.C. § 2244 for Permission to File Rule 60 Motion in

District Court" (Section 2244 Motion), along with a proposed motion under Federal Rule of Civil Procedure 60(b). Specifically, petitioner requested that the court of appeals "grant him permission to pursue Rule 60 relief in the District Court" and "that the appeal be held in abeyance while that is litigated in the District Court." Section 2244 Motion at 20. The proposed Rule 60 motion was premised on the fact that the government had, subsequent to the district court's order denying relief under Section 2255, agreed to use "New Section 1374" to calculate the amount owed in restitution. Petitioner's Section 2244 motion urged that this argument was an appropriate basis for a Rule 60 motion and that his motion did not constitute a second or successive motion under Section 2255. In the alternative, petitioner argued that the Rule 60(b) motion met the circumstances in which a second or successive challenge under Section 2255 is permitted. The United States informed the Eighth Circuit that it did not oppose petitioner being allowed to file his motion in the district court in the first instance. No. 03-3559, Docket Entry of Apr. 5, 2004 (8th Cir.).

On April 12, 2004, the court of appeals denied the motion without discussion and set petitioner's Section 2255 appeal for briefing. Pet. App. 1a. The Section 2255 appeal was fully briefed as of August 17, 2004.

ARGUMENT

1. Petitioner contends that the Court should grant certiorari to determine "whether the restrictions on filing of successor petitions found in 28 U.S.C. § 2244 apply to motions filed under Rule 60(b)" of the Federal Rules of Civil Procedure. Pet. 19. Petitioner states that "[t]he circuits are split in several different directions" on the question and that "[t]his Court granted

certiorari in a similar situation in *Abdur'Rahman* v. *Bell*, 535 U.S. 1016 (2002), but then dismissed the petition as improvidently granted. *Abdur'Rahman* v. *Bell*, 537 U.S. 88 (200[2])." Pet. 19 (citations omitted). This case, however, does not present the question initially accepted for review in *Abdur'Rahman*, and review is not warranted in any event.

a. The Court granted certiorari in *Abdur'Rahman* to review the Sixth Circuit's holding "that every Rule 60(b) Motion constitutes a prohibited 'second or successive' habeas petition as a matter of law." *Abdur'Rahman* v. *Bell*, 537 U.S. 88, 93 n.9 (2002) (Stevens, J., dissenting). The Court later dismissed the writ of certiorari as improvidently granted. *Id.* at 89.

Contrary to petitioner's characterization, this case does not present the question initially accepted for review in *Abdur'Rahman*—*i.e.*, whether "every Rule 60(b) Motion constitutes a prohibited 'second or successive' habeas petition as a matter of law," 537 U.S. 93 n.9—because the Eighth Circuit has not adopted that position. Rather, the Eighth Circuit expressly allows a district court to entertain a purported Rule 60(b) motion in post-conviction proceedings and to determine, in the first instance, whether the motion is, in fact, a second or successive application for relief that is subject to Section 2244's gatekeeper rule. See *Boyd* v. *United States*, 304 F.3d 813 (2002) (per curiam). In *Boyd*, the court "establish[ed] a uniform procedure throughout the Circuit," in which it "encourage[d] district courts, in dealing with purported Rule 60(b) motions following the dismissal of habeas petitions, to employ a procedure whereby the district court files the purported Rule 60(b) motion and then conducts a brief initial inquiry to determine whether the allegations in the Rule 60(b) motion in fact amount to a second or successive collat-

eral attack under either 28 U.S.C. § 2255 or § 2254." *Id.* at 814. The Eighth Circuit further instructed that, "[i]f the district court determines the Rule 60(b) motion is actually a second or successive habeas petition, the district court should dismiss it for failure to obtain authorization from the Court of Appeals or, in its discretion, may transfer the purported Rule 60(b) motion to the Court of Appeals." *Ibid.*

Petitioner did not file a Rule 60(b) motion with the district court, as *Boyd* contemplates. If petitioner believed his arguments were properly brought by way of a Rule 60(b) motion and not subject to the constraints of Section 2244, he could have followed the procedure set forth in *Boyd* and filed the purported Rule 60 motion in the district court in the first instance. If petitioner had done so, the district court would have had the opportunity to consider whether his arguments were cognizable under Rule 60(b) or whether petitioner was required first to obtain a certification from the court of appeals pursuant to Section 2244.

b. Review is also unwarranted because the panel did not explain the basis of its denial, and it is therefore impossible to state the precise holding of the panel. The Eighth Circuit may have concluded that, to the extent that petitioner believed his arguments were the proper subject of a Rule 60 motion, petitioner should have followed the process established in *Boyd*, rather than filing an unnecessary Section 2244 motion to the court of appeals. Similarly, the court of appeals may have viewed the motion as procedurally inappropriate because, as discussed below, pp. 8-9, *infra*, it was inconsistent with applicable Eighth Circuit procedures concerning treatment of Rule 60 motions during the pendency of an appeal from the underlying judgment.

Petitioner does not contend that technical procedural rulings of that sort would warrant further review by this Court.

Alternatively, the panel may have ruled on the merits of petitioner's Section 2244 motion after considering whether the arguments in the proffered Rule 60 motion would constitute a second or successive Section 2255 application, and, if so, whether the narrow circumstances in which a successive motion is permitted were met.* The latter determination, petitioner concedes (Pet. 23), would not be subject to review by way of a petition for writ of certiorari. See 28 U.S.C. 2244(b)(3)(E) ("The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.").

A decision on the threshold question whether a particular motion constitutes a second or successive Section 2255 motion to which Section 2244's gatekeeper process applies may, at least in certain circumstances, be reviewed by this Court. See *Castro* v. *United States*, 124 S. Ct. 786, 790-791 (2003). There is, however, no way to

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* A panel may certify a second or successive motion for relief under 28 U.S.C. 2255 only if the motion is found to contain:

> (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or
>
> (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

28 U.S.C. 2255.

know definitively whether the court of appeals made such a determination in this case.

2. The fact that petitioner's direct appeal from the denial of his initial Section 2255 motion was pending in the court of appeals at the time of his Section 2244 motion does not, as petitioner contends (Pet. 23), provide a further reason for certiorari. Rather, the fact that petitioner's direct appeal remains pending in the court of appeals provides an additional basis for denying review.

a. Petitioner contends that, even if Rule 60 motions in Section 2254 and 2255 cases are generally subject to the certification process set forth in Section 2244, that requirement should not apply where, as here, the initial denial of a Section 2255 motion is subject to review on direct appeal. Pet. 23-24. But the Eighth Circuit has not held that a Rule 60(b) motion may not be filed while an appeal from the denial of an initial Section 2255 motion is pending. Rather, as a general matter, in the Eighth Circuit, district courts *can* consider Rule 60(b) motions while the underlying judgment is before the court of appeals on direct appeal. When a judgment is on direct appeal, jurisdiction over the case is transferred to the court of appeals. See *Griggs* v. *Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982). The Eighth Circuit has adopted a practice that allows the district court "to consider the [Rule 60] motion and if it finds the motion to be without merit to enter an order denying the motion, from which order an appeal may be taken. * * * If, on the other hand, the district court decides that the motion should be granted, counsel for the movant should request the court of appeals to remand the case so that a proper order can be entered." *Pioneer Ins. Co.* v. *Gelt*, 558 F.2d 1303, 1312 (8th Cir. 1977). See *Hunter* v. *Underwood*, 362 F.3d 468, 475 (8th

Cir. 2004) (same). Petitioner, however, did not avail himself of the opportunity to seek an indicative ruling from the district court on the proposed Rule 60 motion.

b. Finally, because petitioner's appeal from the denial of his Section 2255 motion is still pending, there remains the possibility that the court of appeals will accept the arguments that petitioner advances in his pending Section 2255 appeal. The question raised in the petition would thus be rendered moot. That possibility is yet another reason why this case is an unsuitable vehicle for resolution of any broad issue concerning the relationship between Rule 60(b) and the gatekeeper provisions in Section 2244.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 2004